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IN THE

Supreme Court of the United States

October Term, 1971
No. .....

THE CITY OF BURBANK, a municipal corporation; DR. JARVEY GILBERT, Mayor; ROBERT R. MCKENZIE, Vice Mayor; Councilman GEORGE W. HAVEN; Councilman ROBERT A. SWANSON; Councilman D. VERNER GIBSON; JOSEPH N. BAKER, City Manager; SAMUEL GORLICK, City Attorney for the City of Burbank and REX R. ANDREWS, Chief of Police of the City of Burbank,

Appellants,

vs.

LOCKHEED AIR TERMINAL, INC., a corporation, PACIFIC SOUTHWEST AIR LINES, a corporation, and AIR TRANSPORT ASSOCIATION OF AMERICA,

Appellees.

On Appeal From the United States Court of Appeals for the Ninth Circuit.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 22, 1972, which held invalid, as repugnant to the Supremacy Clause of the United States Constitution (Article VI, Clause 2), an ordinance of the City of Burbank, and submit this Statement to

show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial and important questions are presented.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 457 F.2d 667. A copy of that opinion is attached hereto as Appendix A. The opinion of the United States District Court for the Central District of California is reported in 318 F.Supp. 914.

JURISDICTION.

This suit was brought under 28 U.S.C. §§1331(a) and 1337 to have the District Court declare invalid and enjoin the enforcement of Ordinance No. 2216 of the City of Burbank as being repugnant to the Due Process Clause (XIV Amendment), the Commerce Clause (Art. I, Sec. 8, Clause 3), the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14) and the Supremacy Clause (Art. VI, Clause 2) of the Constitution of the United States [R. 1-10].

Appellees subsequently abandoned any contention that the ordinance was repugnant to the Due Process Clause (XIV Amendment) and the War Powers Clauses (Art. I, Sec. 8, Clauses 11-14), and withdrew these issues from the District Court's consideration [R. 89-93; R.Tr. 436-38].

The District Court declared the ordinance unconstitutional, illegal and void, as repugnant to the Supremacy Clause and the Commerce Clause, and enjoined its enforcement [R. 278-310].

The Court of Appeals, in deciding the case, limited itself to the issue whether the ordinance was repugnant

to the Supremacy Clause in two aspects, namely, (1) preemption and (2) conflict. While there was unanimity on the conflict issue and affirmance of the judgment of the District Court, one of the three judges refused to concur in that portion of the opinion which dealt with the preemption issue [Appendix A].

The judgment of the United States Court of Appeals was entered on March 22, 1972. Notice of appeal to this Court was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on May 15, 1972. A copy of this Notice of Appeal is attached hereto as Appendix B.

The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals, by appeal, is conferred by Title 28, United States Code, Section 1254(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on appeal: *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135 (1962); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 492 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954); *Dutton v. Evans*, 400 U.S. 74, 77 (1970).

Ordinance No. 2216 of the City of Burbank, held invalid by the United States Court of Appeals as repugnant to the Supremacy Clause, added Section 20-32.1 to the Burbank Municipal Code which provides as follows [R. 371]:

"Sec. 20-32.1. Aircraft Take-Offs.

"(a) Pure Jets Prohibited from Taking Off Between 11:00 P.M. and 7:00 A.M.

"It shall be unlawful for any person at the controls of a pure jet aircraft to take off from the

Hollywood-Burbank Airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(b) Airport Operator Prohibited from Allowing Take-Offs.

"It shall be unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off from said airport between 11:00 P.M. of one day and 7:00 A.M. the next day.

"(c) Exception: Emergencies.

"This Section shall not apply to flights of an emergency nature if the City's Police Department is contacted and the approval of the Watch Commander on duty is obtained before take-off."

QUESTIONS PRESENTED.

The questions presented by this appeal are as follows:

(1) Whether the Federal government has so preempted the fields of regulation of the use of air space and the regulation of air traffic so as to invalidate and preclude enforcement of the ordinance (Supremacy Clause, Article VI, Clause 2).

(2) Whether the ordinance is in conflict with Federal statutes or Federal regulations and is rendered void and unenforceable by the Supremacy Clause (Article VI, Clause 2).

(3) Whether enforcement of the ordinance would result in an intolerable and unreasonable burden on interstate commerce in violation of the Commerce Clause (Article I, Section 8, Clause 3).

(4) Whether the ordinance constitutes an attempted regulation of a phase of the national commerce which, because of the need of national uniformity, demands that regulation, if any, be prescribed by a single authority.

All of the above questions were answered in the affirmative by the District Court [318 F.Supp. 914]. The Court of Appeals confined itself to questions (1), (2) and (4) and answered these questions in the affirmative [Appendix A].

In the terms and circumstances of the case the question presented by this appeal is whether the City of Burbank is powerless to restrict departures of pure jet aircraft from Hollywood-Burbank Airport, a *privately* owned and operated airport within its boundaries, between the hours of 11:00 p.m. and 7:00 a.m. under the following circumstances:

(a) To accommodate jet aircraft the private airport proprietor (Lockheed Air Terminal, Inc.) has extended the airport runways to the maximum limits of its property so that aircraft using it must necessarily fly at low altitudes over adjacent residences, with resultant disturbance of the occupants of such residences, particularly during the hours normally devoted to sleep [Pl.Exs. 1, 2, 7 and 30].

(b) The Federal Aviation Administrator has refused to make any determinations as to what would be acceptable noise levels in terms of jet aircraft for particular airport environments and has left such determinations in the hands of individual airport proprietors.[1]

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[1]14 C.F.R. §36.5.

(c) Airport proprietors, without violating any Federal statute or regulation, may exclude any aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.[2]

(d) The FAA Chief of the Airport Traffic Control Tower at the Hollywood-Burbank Airport has recognized the seriousness of the noise problem in the vicinity of the airport and the steps taken by him to reduce this problem were ineffective [Pl.Ex. 30; R.Tr. 380, 382].

(e) The Federal Aviation Administrator, under similar circumstances, has declared that nondiscriminatory time limitations may be an effective and appropriate means of adapting aircraft noise to the needs of local communities and that such form of locally responsive noise control is clearly in the national interest.[3]

(f) The only regularly scheduled flight affected by the ordinance was an *intra*state flight of an *intra*state air carrier (Pacific Southwest Air Lines) departing at 11:30 p.m. each Sunday. The other flights affected were principally departures of corporate jet aircraft [R. 389].

STATEMENT OF THE CASE.

Lockheed Air Terminal, Inc. (hereinafter referred to as "Lockheed"), a Delaware corporation, is the owner and operator of Hollywood-Burbank Airport [R. 368]. The airport is located in a thickly populated area [R. 387] and almost entirely within the City of Burbank [R. 374; Pl.Exs. 1 and 2]. Its "North-South"

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[2]Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968).

[3]*In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69).

runway is the preferential runway for take-off (from north to south), not only because of its greater length (approximately 6,900 feet), but also because of its southerly slope and the fact that the prevailing wind is generally from the south [R.Tr. 146-150]. Aircraft taking off to the south over-fly a residential area within the City of Burbank from one-third to one-half mile distant [R.Tr. 405]. Hollywood-Burbank Airport also has an "East-West" runway approximately 6,000 feet in length. Aircraft departing to the east on this runway over-fly a residential area within the City of Burbank somewhat closer than the residential area to the south [Pl.Ex. 30]. Aircraft departing to the west over-fly that portion of the City of Los Angeles known as North Hollywood [Pl.Exs. 1 and 2; R.Tr. 27]. The FAA Departure Charts for Hollywood-Burbank Airport [Pl.Ex. 7] specify minimum climb rates for departing aircraft varying from 260 feet to 347 feet per nautical mile.

None of the runways at Hollywood-Burbank Airport can accommodate the larger jet aircraft, such as the 707 and the DC-8. They are generally sufficient to accommodate the smaller jet aircraft such as the 727, the DC-9 and the 737 [R.Tr. 387-388]. Lockheed achieved the runway lengths indicated by extending these runways to the limits of the property which it owns or controls [Pl.Exs. 1 and 2].

The problem with respect to noise created by aircraft taking off or landing at Hollywood-Burbank Airport dates from about 1965 when jet aircraft began using the airport on a regular basis [R.Tr. 126-127]. The first official recognition of the adverse environmental effects of this jet aircraft traffic was in the latter part of 1967 when the FAA Chief of the Airport

Traffic Control Tower at the airport established non-mandatory procedures for take-offs and landings in an attempt to reduce noise complaints [Pl.Ex. 30]. These procedures were modified several times, the last of which (dated September 4, 1969) provided, on a non-mandatory basis, that Runway 25 (take-offs to the west on the "East-West" runway) should be used as much as possible for departures of turbine powered aircraft during the period from 2300 to 0700 when people are asleep [Pl.Ex. 30]. The only discernible effect of this procedure was an increase in complaints by people living west of the airport [R.Tr. 380]. The number of complaints from south of the airport remained about the same [R.Tr. 382].

On March 31, 1970, the City Council of the City of Burbank duly and regularly adopted Ordinance No. 2216 which added Section 20-32.1 to the Burbank Municipal Code to provide as set forth above. It became effective on May 4, 1970. [R. 371].

Hollywood-Burbank Airport is used by United Air Lines, Western, Air West and Pacific Southwest Air Lines, and now possibly by Continental Air Lines, as an alternate to Los Angeles International Airport (LAX) when landing there is precluded by weather conditions [R.Tr. 167, 183].

United Air Lines, Western, Air West, Continental Air Lines and Pacific Southwest Air Lines also utilize Hollywood-Burbank Airport for regularly scheduled flights. The only regularly scheduled flight affected by the ordinance was an intrastate flight of Pacific Southwest Air Lines (an intrastate air carrier) originating in Oakland, California and departing from Hollywood-Burbank Airport at 11:30 p.m. each Sunday night for San Diego [R.Tr. 167, 183; R. 389].

The only other flights affected by the ordinance were principally departures (at least three per week) of corporate jet aircraft [R. 389].

THE QUESTIONS ARE SUBSTANTIAL.

The questions presented by this appeal are substantial and urgently need this Court's consideration. The following is submitted in support of this statement:

1. Noise Pollution.

In terms of destruction of our environment noise pollution ranks with air and water pollution.[4] Noise caused by jet aircraft and its effects are well documented in definitive works on this subject.[5] The intensity and effect of noise pollution resulting from operations at Hollywood-Burbank Airport and other airports in the Los Angeles area, and the prospects for the future, have been the subject of a specific study.[6] The future is bleak. Jet aircraft in current use have many years of useful life.[7] The Federal Aviation Administration has procrastinated in imposing retrofit re-

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[4]Panel on Noise Abatement, Dept. of Commerce, *The Noise Around Us* 2 (1970).

[5]Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 Colum. L.Rev. 652; Wyle Laboratories Research Staff, *Supporting Information for the Adopted Noise Regulations—Final Report to the Department of Aeronautics* (Report No. WCR 70-3 (R)), 1971; California Department of Public Health, *A Report to the 1971 Legislature on the Subject of Noise Pursuant to Assembly Concurrent Resolution 165, 1970* (1971).

[6]Branch and Beland, *Outdoor Noise and the Metropolitan Environment—Case Study of Los Angeles with Special Reference to Aircraft, 1970* (Library of Congress Catalog Card No. 72-126027).

[7]Reporter's Transcript, pp. 317-20.

quirements on these aircraft.[8] Even retrofitting will provide little relief.[9] Noise standards imposed by the Federal Aviation Administration on new subsonic aircraft are inadequate.[10]

2. Attempts to Provide Some Relief.

Communities faced with the destruction of their environment by aircraft taking off and landing at airports outside their boundaries have attempted to provide some relief to their residents through legislation requiring aircraft to fly at a height which would lessen the noise impact. In every case where this has been attempted, the lower Federal courts have held the legislation to be invalid.[11] Prior to this case no Federal Court had decided the question whether a municipality could, for the same purpose, impose reasonable restrictions on an airport located within its boundaries, and no Federal Court of Appeals had squarely held that Congress has preempted the field of regulation and control of aircraft noise.[12] In contrast to the conclusion

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[8]It was not until October 30, 1970 that the FAA issued an Advance Notice of Proposed Rulemaking concerning "civil airplane noise reduction retrofit requirements" (35 Fed.Reg. 16980). Nothing, as yet, has resulted from this.

[9]Reporter's Transcript, pp. 313-14.

[10]Berger, *Nobody Loves an Airport*, 43 So.Cal.L.R. 631, 770-74 (1970).

[11]*American Airlines, Inc. v. Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd* 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); *Allegheny Airlines, Inc. v. Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *American Airlines Inc. v. Audubon Park*, 297 F.Supp. 207 (W.D.Ky. 1968), *aff'd per curiam*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).

[12]In *American Airlines, Inc. v. Hempstead, supra*, the Court of Appeals stated, 398 F.2d 369, at p. 376 (footnote 4): "But the problem arises that it is this particular noise ordinance in this particular setting which is found to regulate flight paths and procedures; *another noise ordinance might not have that effect.*" (Italics added)

reached by the Court of Appeals in this case, a California Court of Appeal, in *Stagg v. Municipal Court of Santa Monica Judicial District*,[13] held that Congress has not preempted this area of regulation and sustained an ordinance of the City of Santa Monica almost identical with the Burbank ordinance. A lower court of New Jersey reached the same conclusion and enjoined jet aircraft operations in or out of the Morristown Airport between 9:00 p.m. and 7:00 a.m. Monday through Saturday and on Sundays, other than between the hours of 1:00 p.m. and 3:00 p.m.[14] Notwithstanding the adverse climate created by the Federal lower court decisions, States and local governments continue in their attempts to provide some relief from

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[13] 2 Cal.App.3d 318, 82 Cal.Rptr. 578 (1969).

[14] *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Atl.Rptr.2d 692 (1969). In so holding the Court stated in part as follows (261 Atl.Rptr. 692, at pp. 701, 706):

> "At Morristown Airport the offensive engine noises for the most part are not emitted by airplanes serving the general public, but by the jets of the few corporate executives who own or charter the aircraft which noisily ride the invisible highway as an industrial status symbol. (See: Harley, Jr., TC, CCH Dec. 29, 803 [M], ¶7703 [M] [1969]). If not simply a symbol it is argued that time and energy of the corporate officer and employee is saved. The importance of the speed of travel to the corporate executive must be placed on one side of the scale and balanced against the domestic tranquility to which family and the neighborhood are entitled."
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> "Most intrusive is the noise from corporate jets. If these are truly used for business, why should not the hours of landing and take-off be limited to normal, reasonable business hours? The corporate executive's desire for early departure and late returns may have to be sacrificed in the interest of a good night's rest for the residents. He may have to leave a day earlier or return a day later. His absence for a few hours more or less will not send his corporation into bankruptcy."

the adverse effects of jet aircraft noise.[15] No doubt this will continue until this Court finally decides the question.

3. Relief Through Legislative Action at the Federal Level.

The demands of citizens for relief from noise pollution and other activities which destroy the environment in which they live have to a degree filtered through to their elected representatives in Washington. As a result we now have the National Environmental Policy Act,[16] the Environmental Education Act,[17] the Air

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[15]On November 6, 1970 the *City of Inglewood, California* (adjacent to the Los Angeles International Airport) added Sections 4620 and 4620.1 to its Municipal Code which impose noise limitations on aircraft which fly below the minimum altitudes of flight prescribed by the FAA for landings and take-offs. These sections were promptly challenged by the Air Transport Association of America and others in the United States District Court for the Central District of California (No. 71-1153-CC), which issued a temporary restraining order and a preliminary injunction, and later by the United States (Federal Aviation Administration) in a separate action (No. 71-1632-CC). These cases have not as yet been tried; in 1969 *California* adopted legislation (Sections 21669-21669.5, Public Utilities Code) which required the Department of Aeronautics of the State of California to adopt noise standards governing the operation of aircraft and aircraft engines for airports operating under a valid permit issued by the Department, to an extent not prohibited by Federal law (while the noise standards have been promulgated their effective date has been postponed until December 1, 1972); the *Town of Hempstead, New York* is supporting a bill introduced in the New York legislature which would ban flights from metropolitan airports between midnight and 6:00 a.m.; the legislature of the State of *Massachusetts* has considered placing into effect a statute which would prohibit commercial supersonic transport planes not capable of limiting their noise level to 108 decibels or less from landing or taking off in that state (This proposed legislation was considered in the *Opinion of the Justices of the Supreme Judicial Court of Massachusetts* (1971), 271 N.E.2d 354).

[16]42 U.S.C. §4321 *et seq.*

[17]20 US.C. §1531 *et seq.*

Quality Act of 1967[18] and the Environment Quality Improvement Act of 1970.[19] The difficulty with these legislative acts is that they provide no present relief from existing noise pollution. Even with respect to new projects which may have an adverse effect on the environment, it has been necessary for this Court[20] and other courts[21] to compel the Federal agencies concerned to give proper consideration to the environmental impact of proposed actions in accordance with the provisions of the applicable statute. This Court has, without the benefit of specific legislation by Congress, intervened to protect the environment.[22]

4. Posture of the Federal Aviation Administration.

Appellees took the position before the Court of Appeals that the Federal Aviation Administrator has had the power, at least since 1958, to directly deal with jet aircraft noise, and that the addition in 1968 of Section 611 (49 U.S.C. §1431) to the Federal Aviation Act of 1958 merely buttressed his authority.[23] However, it was not until November of 1969 that any-

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[18]42 U.S.C. §1857 *et seq.*

[19]42 U.S.C. §§4371-4374. In this Act it is declared that "The primary responsibility for implementing this policy rests with State and local governments" (Section 202(b)(2); 42 U.S.C §4371(b)(2)).

[20]*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

[21]*Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109 (D.C.Cir. 1971). There the Court stated (at p. 1111):

> "Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy."

[22]*New Jersey v. New York*, 283 U.S. 336 (1931); *Udall v. Federal Power Commission*, 387 U.S. 428 (1967).

[23]Brief of the Appellees, pp. 18-19, citing 49 U.S.C. §1348(c).

thing was attempted by the Federal Aviation Administration to regulate the noise at its source. At that time the Federal Aviation Administration adopted regulations prescribing noise standards for all new subsonic turbojet-powered aircraft.[34] At this time it is considering regulations concerning civil airplane noise reduction retrofit requirements.[35] It is worthy of note that at every opportunity the Federal Aviation Administration expressly disclaims that the noise standards which it adopts are acceptable in any specific airport environment and following its previous pattern declares that airport owners acting as proprietors can deny the use of their airports to aircraft on the basis of noise considerations.[36] The net result is that airport proprietors are *not* regulated in terms of the permissible level of noise which may be created by aircraft using their airports. This attitude and approach by the Federal Aviation Administration allows the Federal government to remain immune from liability for aircraft noise under *Griggs v. Allegheny County*.[37] It also permits the Federal Aviation Administration to parry the thrust of citizens' complaints by pointing to the airport proprietor as the culprit. As a result we have the "lacuna" about which the California Supreme Court warned in *Loma Portal Civic Club v. American Airlines, Inc.*[38] If the decision in this case stands, the last door

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[34]14 C.F.R. §36 *et seq.*

[35]35 Fed. Reg. 16980.

[36]Letter dated June 22, 1968 from the Secretary of Transportation to the Committee on Interstate Commerce contained in Senate Report No. 1353, 90th Cong. 2d Sess. 6-7 (1968); *In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69); 14 C.F.R. §36.5.

[37]369 U.S. 84 (1962).

[38]61 Cal.2d 582, 39 Cal.Rptr. 708, 394 P.2d 548, at p. 554 (1964).

is closed on any attempt to fill the hiatus created by the posture of the Federal Aviation Administration.[29]

5. Griggs v. Allegheny County.

To some legal writers the decision of this Court in *Griggs v. Allegheny County*[30] was unfortunate. They claim that had the dissent prevailed so that the Federal government would be liable for the "taking" of air or noise easements, meaningful relief would have long since been provided for those who have the misfortune of residing in the vicinity of airports.[31] In any event if Congress has in fact preempted the field of regulation of noise created by jet aircraft to the exclusion of States and local governments, as the opinion of the Court of Appeals in this case so holds, then the decision in *Griggs* must be reconsidered, something only this Court

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[29]One commentator has described the situation in this fashion:

> "The FAA has attempted to play both ends against the middle—with the private citizens winding up in the middle. It piously states that no complete answer can come from the federal government and that local regulation is both necessary and desirable. At the same time, it accepts with open arms the court determinations that any action to relieve the noise nuisance of aircraft must come from the federal government, i.e. the FAA, and impedes action by municipalities which goes beyond programs of 'compatible land use.' It seems to be going out of its way to limit local regulation while providing little in the way of a national solution; and this serves only the interest of one segment of the public—the industry it was set up to regulate." Berger, *Nobody Loves an Airport*, 43 So.Cal.L.R. 631, at p. 724 (1970).

[30]369 U.S. 84 (1962). In this case the Court held that the airport proprietor, not the Federal government or the airlines, was liable for the "taking" of air or noise easements necessary for the airport's operations.

[31]Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 Urban Lawyer 175, at p. 202 (1971); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup.Ct. Rev. 63.

can do. With power should go responsibility. If the decision in this case is allowed to stand without reversal of *Griggs*, then the Federal Aviation Administration will be able to continue its questionable course of conduct without interference, and the Federal government and the airlines will remain shielded from liability for their actions or non-action.

6. Huron Portland Cement Co. v. Detroit.

In *Huron Portland Cement Co. v. Detroit*,[23] a decision handed down by this Court in 1960, the power of a municipality to relieve its residents from some of the adverse effects of air pollution was sustained. Had this decision been followed by the lower Federal courts and expanded to include noise and other types of pollution, this nation, through action taken by State and local governments, would have been far along the road of alleviating their adverse effects. Instead the lower Federal courts have taken great pains to rob this decision of any vitality, as has been done in this case, and have thrusted it aside as not being germane in cases dealing with noise pollution caused by jet aircraft.[25] In contrast, state courts have relied on this decision in reaching opposite results.[24] The issues in this case are of far greater importance than those considered by this Court in *Huron*.

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[23] 362 U.S. 440 (1960).

[25] *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226 (E.D.N.Y. 1967); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369 (2d Cir. 1968). See also *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971). Compare *Head v. Board of Examiners*, 374 U.S. 424, at pp. 428-429 (1963).

[24] *Township of Hanover v. Town of Morristown*, 108 N.J. Super. 461, 261 Alt.Rptr.2d 692 (1969). See also *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 39 Cal. Rptr. 708, 394 P.2d 548, at p. 555 (1964).

7. Preemption.

The last occasion this Court has taken to consider the Federal Aviation Act of 1958 (49 U.S.C. §1301, *et seq.*) in terms of preemption was in the case of *Colorado Anti-Discrimination Com. v. Continental Air Lines, Inc.*[35] There with reference to the Colorado Anti-Discrimination Act, this Court held that Congress had not preempted this particular area of regulation. Prior to that time, in 1954, this Court considered the Civil Aeronautics Act of 1938, the predecessor to the Federal Aviation Act of 1958, in *Braniff Airways v. Nebraska State Board.*[36] In reaching its decision that there was no Federal preemption, this Court, in support of that determination, noted the adoption by States of the uniform Aeronautics Act which, among other things, provided for regulation of airports. Neither the District Court nor the Court of Appeals in this case gave any weight to these decisions nor to the decision in *Head v. Board of Examiners.*[37] What the decision in this case amounts to is a declaration, as a *matter of law* and no matter what the circumstances may be, that States and local governments have no power to enact any regulations relating to airport proprietors. The justification for this conclusion is that "they *might conceivably* be over-protective of one of the multiple values and upset the delicate balance struck by the FAA under the aegis of federal law"[38] (italics added). This in spite of the fact that airport proprietors may deny the use of their airports to aircraft on the basis of

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[35]372 U.S. 714 (1963).
[36]347 U.S. 590 (1954).
[37]374 U.S. 424 (1963).
[38]Appendix A, Page 11.

noise considerations[39] and thus can do the very thing which the Court claims might upset the delicate balance struck by the FAA. This Court, in *Rice v. Board of Trade*,[40] held that within the zone where a Federally regulated enterprise has freedom to act, a State may impose reasonable regulations.[41]

8. Conflict.

In reaching its conclusion that the Burbank ordinance was in conflict with Federal rules and regulations, the Court of Appeals relied exclusively on *Perez v. Campbell*,[42] a case not even remotely related to what could be considered a statute enacted to protect health or safety. The conflict which it found was with respect to a *non-mandatory* runway preference order of a minor FAA official in charge of the air traffic control tower at Hollywood-Burbank Airport,[43] a regulation which admittedly contributed little, if anything, toward providing relief for persons residing in the vicinity of that airport.[44] In contrast to this, the Federal Aviation Administrator had previously declared, in a situation where runway preference orders and other regulations locally imposed by the FAA representative had not

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[39]*Supra*, note 26.

[40]331 U.S. 247 (1947).

[41]331 U.S. 247, at p. 254.

[42]402 U.S. 637 (1971).

[43]Appendix A, p. 14. It is difficult to understand how the Court could conclude that this non-mandatory order represented a considered determination by the FAA that any further steps to reduce noise would be beneath "the lowest practicable minimum," in view of the fact that the FAA has refused to make any determination as to the acceptability of prescribed noise levels in any specific airport environment (14 C.F.R. §36.5) and airport proprietors can exclude any aircraft on the basis of noise considerations (see note 26, *supra*).

[44]Reporter's Transcript, pp. 380, 382.

provided needed relief, that time restrictions similar to those imposed by the City of Burbank would be "an effective and appropriate means of adapting aircraft noise to the needs of the local communities" and would be "clearly in the national interest."[45] While acceding to this proposition where time restrictions are imposed by an airport proprietor, the Court of Appeals held that such restrictions could not be imposed by States or local governments, citing an advisory opinion of the Justices of the Supreme Judicial Court of Massachusetts who, although expressing serious doubt that they could, refused to decide the issue.[46]

9. Burden on Interstate Commerce.

Although the Court of Appeals declined to consider the issue as to whether the Burbank ordinance constituted an unreasonable burden on interstate commerce, the District Court concluded that it did. This conclusion was reached, not because the ordinance did in fact burden interstate commerce, since it only affected one regularly scheduled *intra*state flight[47] and flights of corporate jet aircraft, but rather on the basis that the ordinance had to be viewed as if it were

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[45] *In re Dreifus*, FAA Regulatory Docket No. 9071 (7/10/69).

[46] *Opinion of the Justices of the Supreme Judicial Court of Massachusetts*, 271 N.E.2d 354 (1971). The FAA has consistently taken the position that while airport proprietors can deny the use of their airports to aircraft on the basis of noise consideration, States and local governments "may not use their police power to regulate in any way the flight of aircraft for noise purposes." The FAA justifies the time restrictions which it has placed on the Washington National Airport on the ground that it "is the proprietor of that airport" (*In re Dreifus, supra*, note 45; see also 14 C.F.R. §36.5 and letter dated June 22, 1968 from Secretary of Transportation, *supra*, note 2).

[47] PSA has since changed the time of departure of its Sunday night flight to San Diego from 11:30 p.m. to 10:50 p.m.

adopted by all major airports within the United States. A similar argument was advanced in the recent case of *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[48] and found wanting.

10. Violation of Fifth, Ninth and Tenth Amendment Rights.

One of the points which Appellants stressed in their argument before the Court of Appeals was that a holding that Burbank is powerless to enact and enforce the ordinance in question would allow private airport proprietors, such as Lockheed, to ride roughshod over the rights of owners of property surrounding airports in violation of constitutional guarantees.[49] This is exactly what has occurred and is occurring since the District Court's decision. If the activities and conduct of the Federal Aviation Administration and the United States in connection with the Hollywood-Burbank Airport are sufficient to constitute Federal action,[50] then the Fifth Amendment would apply. An action for dam-

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[48]40 U.S. Law Week 4391, at pp. 4395-96 (1972); 31 L.Ed. 2d 620, 631-632 (1972).

[49]Brief of the Appellants, p. 40.

[50]Approximately 2,050 feet of the northernmost portion of the "North-South" runway and approximately 2,250 feet of the westernmost portion of the "East-West" runway are on land owned by the United States Government [R. 374-75]; the FAA has expended approximately $2,000,000 on the installation of navigational aids at Hollywood-Burbank Airport including the Instrument Landing System ("ILS"), runway approach and identification lights, and radar and radio equipment, and operates the Airport Traffic Control Tower and Radar Approach and Departure Control at that airport [R. 379]; the FAA has included Hollywood-Burbank Airport in the National Airport Plan [Pl. Ex.56] in spite of the fact that Congress had specifically directed that such Plan was to embrace airports owned and operated by States and local public agencies (49 U.S.C. §1101, §1102).

ages or in inverse condemnation can hardly be considered a substitute for that portion of the Fifth Amendment which guarantees that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." Those who live in the vicinity of Hollywood-Burbank Airport are daily being deprived of a chance to enjoy a life free from constant bombardment by sound waves. Their liberty and the use of their property are severely restricted by the adverse environment imposed on them by a private corporation for private gain and without just compensation having been paid.[51] Surely this is an area in which a municipality or a State may reasonably legislate, as they have in the area of life, liberty or property taken by direct physical force. The Commerce Clause cannot shield those who invade Fifth Amendment rights, and legislation, such as the Burbank ordinance, which seeks in some degree to preserve such rights until due process is satisfied and just compensation paid, must be upheld if that Amendment is to have any real meaning.[52]

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[51]The California Supreme Court has recently recognized that more is involved than the mere "taking" of property, in holding that an action grounded on public nuisance will lie. See *Nestle v. City of Santa Monica*, 6 Cal.3d 920, 101 Cal.Rptr. 568, 496 P.2d 480 (1972).

[52]In *Bell v. Burson*, 402 U.S. 535 (1971), this Court held that *before* a person's driving privileges could be terminated because of involvement in an accident, the Due Process Clause of the Fourteenth Amendment requires that a hearing be provided for the determination of whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident

(This footnote is continued on next page)

If the Fifth Amendment is not applicable, there is a respectable body of opinion that the right to a decent environment is one of the rights retained by the people under the Ninth and Tenth Amendments, and that action which leads to the destruction of the environment may be restrained or limited.[22] Apart from this, it would appear to be beyond question that one of the rights retained by the people under the Ninth and Tenth Amendments was the right to restrain private persons and corporations who would seek to interfere with their lives and liberty or take their property without first paying just compensation. Under either of these propositions the Burbank ordinance is such a restraint, having been enacted by a legislative body duly elected by the People of the City of Burbank.

CONCLUSION.

Accordingly, it is respectfully submitted that the questions involved in this case are of paramount public importance. They transcend the factual situation here presented. Unless this Court acts, the intolerable situation now existing as a result of noise pollution caused by jet aircraft can only become worse. Though they

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(402 U.S. 535, at pp. 542-43). It is a logical extension of this decision that *before* a person may be deprived of the use and enjoyment of his property, just compensation must be paid or, at the very least, deposited in court.

[22]Roberts, *An Environmental Lawyer Urges: Plead The Ninth Amendment*, Natural History, 26 (Aug.-Sept. 1970); Redlich, *Are There Certain Rights . . . Retained by the People?* 37 N.Y.U. L. Rev. 786 (1962); Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 Los Angeles Bar Bulletin 415 (Sept. 1971). See also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

soar into a different realm,[14] the impact of jet aircraft on earth-bound lives and property is very real and substantial.

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[14] *Chicago and Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 107 (1948).